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No. 86-1297

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM BACKLUND,

Appellant,

v.

THE BOARD OF COMMISSIONERS OF KING COUNTY HOSPITAL DISTRICT NO. 2,

Appellee.

On Appeal From The Supreme Court of Washington

MOTION OF APPELLEE BOARD OF COMMISSIONERS OF KING COUNTY HOSPITAL DISTRICT NO. 2 TO DISMISS OR AFFIRM

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Questions Presented

A public hospital district in the State of Washington required its physicians as a condition of staff privileges to carry professional liability insurance to protect the District patients and District assets.

One of the District's staff physicians asserted that his right to the free exercise of his religion, as guaranteed under the United States Constitution, entitled him to an exemption from the requirement. A hearing was held and the governing board of the district determined that the physician's federal rights did not entitle him to an exemption, given the fact that he had shown no evidence of how his patients would be compensated in the event his treatment at the hospital caused them to suffer damages for which he was liable and because the assets and patients of the

Hospital District were threatened by his position.

The physician challenged the decision in state court on the ground that the decision of the Board was in error in that his first amendment rights entitled him to an exemption, assigning fault primarily to the findings of fact made by the Board of Commissioners of the Hospital District in rendering its decision.

The Washington Supreme Court unanimously upheld the decision of the Board of Commissioners on the grounds that it was supported by findings of fact that demonstrated a compelling state interest, achievable by no less restrictive alternatives.

The questions presented are:

1. Whether the Washington Supreme Court's denial of the physician's assertion of rights under the free exercise clause is a basis for invoking

this Court's appellate jurisdiction or is the physician limited to seeking review of that decision by a petition for a writ of certiorari?

2. Whether this Court should summarily affirm the decision of the Washington Supreme Court or dismiss the appeal of the physician for lack of jurisdiction or lack of a substantial federal question in that a contrary decision would have (a) potentially left the District's patients without remedy in the event of Dr. Backlund's negligence, and (b) left the assets of the hospital subject to payment for any damages caused by Dr. Backlund if the hospital were adjudged jointly and severally liable for his negligence?

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Motion to Dismiss or Affirm

Pursuant to Rule 16.1, the appellee Board of Commissioners of King County Hospital District No. 2 moves to dismiss the appeal filed on behalf of William Backlund. The motion is grounded in the fact that this case is not within this Court's appellate jurisdiction because the federal question sought to be reviewed (a) was neither timely nor properly raised and (b) does not raise a substantial federal question. Alternatively, the Board moves for the summary affirmance of the decision of the Washington State Supreme Court.[1]

Statutory Provision Involved

In pertinent part, 28 USC §1257 provides:

> Final judgments or decrees rendered by the highest court of the state in

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[1] References to the record will be to the transcript of the hearings (RP), the exhibits introduced before the Board of Commissioners and the Board's Findings, Conclusions and Decision. Other references will be to pleadings in the courts below.

which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

> (2) by appeal, where is drawn in question the validity of the statute
>
> of any state on the ground of its being repugnant to the Constitution Treaties or Law of the United States and the decision is in favor of its validity.
>
> (3) by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes, or commission held or authority exercised under, the United States.

Statement of the Case

King County Public Hospital District No. 2 is a municipal corporation organized under Chapter 70.44 of the Revised Code of Washington. The District is governed by its elected Board of Commissioners ("Board"). The District has within its boundaries a portion of the area comprising King County, Washington. Its purpose, as a public hospital district, is to provide health care services for residents

living within the district's boundaries and other patients. The District owns and operates Evergreen General Hospital ("Evergreen"), which is located in Kirkland, Washington, in the greater Seattle area.

Dr. William Backlund became a staff physician at Evergreen in 1974. He does not carry professional liability insurance. When he applied for staff membership privileges at Evergreen, he asked the then superintendent whether the District required its staff physicians to carry such insurance. He was told that such insurance was not then a requirement although the superintendent considered it desirable. In response, Dr. Backlund told the superintendent that he had been informed by his attorney that hospitals themselves carry professional liability insurance. Exhibit C.

Staff members of Evergreen are granted one-year appointments, which may be renewed by the Board. In return, physicians agree to be subject to District Bylaws, which may be amended. Dr. Backlund's privileges were renewed regularly after his initial appointment. Exhibit 23.

In July, 1982, the Joint Conference Committee for Evergreen, which is comprised of hospital administrators, Board commissioners and staff physicians, began studying whether or not it would be prudent for the Hospital District to require staff physicians to carry professional liability insurance as a condition of practicing at the Hospital. Exhibit 2.

Evergreen's chief concern in making the proposal for mandatory insurance for physicians was assuring a fund for the payment of claims to Evergreen's patients

in the event of physician error, regardless of whether the hospital was liable. RP 31.

A second major concern was protecting the hospital's assets where the hospital was jointly and severally liable with the physician, since, by statute, all tort-feasors in the State of Washington are jointly and severally liable to one injured by their misconduct. RCW 4.22.030. (In 1986, the statute was amended by another statute codified at RCW 4.22.070 so that joint and several liability was limited to those occasions where a plaintiff was adjudged not to be comparatively at fault; it is, of course, a situation uncommon in medical malpractice cases for a plaintiff to be found at fault.) Thus, the District, even though, say, 5% liable for the injuries of a plaintiff, would be liable for the full amount of any judgment in the event the

tortfeasor primarily liable could not respond in damages. RP 169.

Third, plaintiffs in medical malpractice cases attempt to include defendants, other than the uninsured physician who is primarily liable, in order to have access to the "deep pocket" insurance coverage of those added defendants. RP 160. As a result, the Hospital's insurance carrier or the Hospital itself if its policy limits were exceeded by a judgment, would likely have to bear the major part of the loss caused by an uninsured physician even if the loss were disproportionate to the amount of negligence the Hospital had committed. RP 167-68. (The Hospital, of course, could expect to be sued whether it was liable or not. RP 162.)

Fourth, cases involving uninsured ("bare") health care providers are more difficult to settle because a doctor

without insurance probably does not have the financial ability to participate fairly in settlement negotiations. RP 165.

Fifth, there was concern over the anxiety among staff members and physicians who were, in effect, compelled to work with bare physicians and were unfairly subject to more liability exposure as a result. RP 118-20.

Sixth, there was concern that bare physicians and those who work with bare physicians would be more likely to practice defensive medicine, that is, medically unnecessary treatment for the purpose of documentation in the event of a malpractice suit. RP 128.

Seventh, there was concern over the long term impact that bare physicians would have on the hospital's liability insurance premiums. RP 147.

The hospital's physicians were asked for their opinions. A majority of the surgical staff voted in favor of the requirement. RP 119. The Executive Committee (which is a committee of physicians concerned with quality assurance at the hospital) voted against immediate adoption, preferring to reconsider the issue in a year. Exhibit 6. The concern expressed by the Executive Committee was whether the decision on insurance should be made by the hospital district or left to the physician and the patient, rather than whether mandatory insurance itself was necessary to protect the public. Exhibit 7; cf. RP 31.

In February of 1983, a draft "discussion" paper was prepared by the administrative staff at the hospital. The staff analyzed the issue from a purely business perspective; the staff did not consider whether there were any

non-business concerns, such as protection of the hospital's patients, which might independently justify the requirement. It was pointed out in the paper that there was one bare physician, Dr. Backlund. Concern was expressed that implementation of the requirement could cause him to move his practice, which would result in a reduction of hospital revenues by over $100,000.00 annually. The staff was also concerned that he might bring a lawsuit over the requirement.

The administrative staff expressed the opinion that the short-term impact of the requirement on the hospital's premiums would not be offset by probable losses. This was so since coverage at that time was through an organization known as the Washington Hospital Liability Insurance Fund (WHLIF). Evergreen's premiums were based on claims against all of the 74 hospitals who were members of the fund

(commonly known as a "community rating") and not on claims against Evergreen alone (that is, an "experience" rating).

The staff recommended that Evergreen request WHLIF to make mandatory malpractice insurance coverage a condition of its insurance coverage for all members of the pool so that the "risk profile of the entire pool [of hospitals]" covered by the insurance, including Evergreen, could be reduced for long-term premium control.

No consensus was reached by the Joint Conference Committee on whether to adopt or endorse the draft paper. The two physicians on the committee abstained from the vote on the ground that this was a business decision outside their "responsibility for quality of care." Exhibit 11.

The Board of Commissioners of the District next considered the matter, and rejected the recommendation in the staff report and its purely business perspective

as short-sighted. The Board instead adopted the mandatory insurance requirement on April 26, 1983.

In doing so, the Board recognized that increased revenues for the Hospital and lower insurance premiums were just two of the District's concern. Another concern was to insure that a fund for District residents was available in the event a physician caused damages in treating a patient on hospital grounds, regardless of the hospital's liability. Exhibit 15.

At the time the Bylaw was passed, Dr. William Backlund had had his staff privileges continuously renewed at Evergreen and was on the call list for the Hospital's emergency room and the general hospital referral list. He had continued not to carry professional liability insurance, which he indicated was in some fashion related to his religious beliefs.

The professional liability insurance requirement became effective on July 1, 1983. On July 5th, over forty physicians, including Dr. Backlund, were notified by letter that their privileges would be suspended for failure to comply with the Bylaw. RP 152. Of those, Dr. Backlund asked for a hearing before the District Joint Conference Committee for the purpose of obtaining an exemption from the requirement. The request for a hearing was granted.

His initial position before the Joint Conference Committee was that there was no reasonable relationship between the requirement and the purpose behind the requirement inasmuch as physician insurance merely "duplicated" coverage the hospital already had. The result, Dr. Backlund argued, was additional cost to the patient without additional coverage. RP 10; RP 59-61.

He testified that because of the practical "secular" benefits of his decision (as well as his desire to "emphasize" various religious principles) he could not in good conscience make any other choice but to continue to not have medical liability insurance. RP 29-31. He indicated that a major benefit was being able to reduce his fees by avoiding the "high policy premium exacted by insurance companies for orthopedic coverage." RP 31. The testimony was that normal coverage for Dr. Backlund's specialty cost between $9,000.00 and $20,000.00 annually. RP 60.

Another benefit was his desire not to participate in what he called the malpractice "easy money" game:

> I don't believe we should be penalized for making honest, human mistakes. I think that it is a totally wrong philosophy in our society.
>
> Sure, if they are grossly negligent, yes, but that rarely occurs nowadays

> in this "malpractice issue." It is a matter of dissatisfied patients or a bad--you know, a poor result or something they don't like, that type of thing.
>
> I think there has to be more trust. I see this as an action of mistrust, that the board of a hospital does not trust the staff of its hospital, at least themselves, and to do high quality of care, which I really believe we do here.

RP 48.

Other reasons he gave for his position were his desire to (1) decrease third-party involvement in his practice, (2) not take cases where he had doubts over his competence, and (3) increase the trust in his relationships with his patients. RP 30-32.

Dr. Backlund was asked about whether he was concerned over the fact that some of his patients, for whatever reason, did not learn of his position on insurance. He said it did not concern him:

> I don't consider it that important. I tell [the patients] that I don't have it. They can go elsewhere if they want. You know, I think you

> folks make a big deal of it. I don't think it is that big a deal.
>
> I think the patient needs to be taken care of. You know, I was thinking about this insurance thing, you know, and why, why, why? Well, never mind.

RP 47.

The evidence at the hearing demonstrated that Dr. Backlund's contention that any insurance he purchased would be "duplicative" was in error. The testimony was undisputed that physicians can be adjudged solely liable for malpractice claims, and that in such circumstances, the hospital's coverage does not provide a remedy for the injured patient. RP 57-58.

At one point, Dr. Backlund was questioned by a staff physician on the Joint Conference Committee concerning Dr. Backlund's unwillingness to provide a fund which would allow him to answer in damages for any negligence he committed:

> [Question by Dr. Wahl] Doesn't that bother you a little bit? That the

> patient does not have any ability to sort of recover damages, let's say, for paraplegia for the next 20 years of his life?
>
> A. No, that doesn't bother me. They need to be taken care of. Tragedies happen. Problems occur in our society and you don't have always to be pointing blames on persons for them and getting money for them.

RP 49.

The testimony presented by the hospital at the hearing indicated that the mandatory insurance requirement was necessary in that it provided a fund to compensate injured patients, and would have a long-term positive impact on the insurance premiums that Evergreen would have to pay. RP 57-58; 35.

In closing argument, Dr. Backlund objected to the hospital's public statements that the decision was made to be "sure that patients will be compensated if they are injured." Dr. Backlund argued that this was a matter that should be left to doctors and their patients. RP 31.

The Joint Conference Committee recommended that the Board of Commissioners grant Dr. Backlund a hearing on whether Dr. Backlund should be granted an exemption from the requirement.

The Board accepted the recommendation. On October 13, 1983, a proposed hearing was canceled so that attorneys for the Hospital and Dr. Backlund could explore the possibility of settling the case. At the October 13th hearing, the Chairman of the Commission directed the Hospital Administrator to inquire into the areas of "possible reconciliation or settlement." There is no evidence of what offers were made in the record. The only evidence is that whatever was proposed as a less restrictive alternative by the Board was rejected by Dr. Backlund; he insisted on a complete exemption. RP 69-73.

Accordingly, no settlement was reached; the hearing was rescheduled for December 8, 1983. This time, Dr. Backlund's primary position was that his assertion of his federal right to freely exercise his religious beliefs justified a "waiver" or exemption from the requirement. RP 198.

Expert testimony at the hearing introduced by the Hospital demonstrated that the Bylaw assured, for the benefit of the community, compensation for patients injured at Evergreen aside from any liability the Hospital might have. RP 151.

The evidence also demonstrated that enforcement of the Bylaw would have a positive impact, which was potentially significant, on the amount of liability exposure the Hospital would have in cases of malpractice claims. RP 144-45; 148-49.

Not only did the evidence show that the requirement protected District patients and assets, but that insured health care providers including Evergreen subsidized the practices of those who were uninsured:

> [T]he practical effect is that the hospital insurance company may well become, for all practical purposes, the insurance carrier for the uninsured physician. . . . The pressure from the plaintiff's attorney representing the injured party is going to be more on the insured party in the case, and I know this case when you have two health care providers, one who is insured and one who isn't, my experience is that the insured health care provider is going to pay the larger part of the expense because it is hard to get blood out of a turnip. (Emphasis supplied.

RP at 165-68.

The evidence demonstrated that this was true because those with insurance become the targets of medical malpractice lawsuits because they have "deep pocket" insurance coverage; they are left paying amounts disproportionately greater than

their degree of fault. RP 160. They also are forced into settling cases where they are without fault because they are exposed to liability greater than their potential comparable liability since they would have no possibility of indemnity from a judgment-proof co-defendant. RP 165-68. This was so since most cases cannot be resolved in a motion for summary judgment. This means that cases either go to trial or settle. RP 163. Because of the great potential exposure in medical malpractice cases, health care providers in the large majority of cases settle even if they are not liable. RP 164. Inevitably, therefore, the insurer for the hospital will act as the insurer for the uninsured physician as well. RP 165.

The evidence also showed that mandatory liability coverage served to decrease defensive medicine, not only by those who would otherwise be uninsured,

but also for those who were required to work with these physicians. Extra unneeded costs caused by defensive medicine were shown to be necessarily passed on to the patients of the hospital. RP 128-29; 137.

Other testimony indicated that insured physicians (and other staff) at the Hospital had expressed anxiety over working with uninsured physicians. RP 103. From a practical point of view, some physicians were compelled to accept Dr. Backlund's decision as it affected them since they were placed in circumstances where they could not, out of concern for the health needs of a patient, refuse to work with Dr. Backlund. The evidence showed, for example, that radiologists, anesthesiologists, and nurses (especially in emergency situations) could not practicably refuse to work with an uninsured physician. RP 115-16;

Memorandum in Submittal of Evergreen Hospital, at 5.

After the hospital presented its case, Dr. Backlund was examined regarding his request for a waiver from the Bylaw. In contrast to his testimony before the Joint Conference Committee, Dr. Backlund did not testify as to any of the non-religiously-based "practical" reasons for his decision. Rather, he indicated that the sole reason for his stand was a religious conviction (which he acknowledged was unique to him and not part of any doctrine of his church) received through "prayerful consideration of the [Bible]." RP 220.

Dr. Backlund was asked how he would compensate patients monetarily in the event he committed an error in his treatment. He indicated he would "do whatever" he could. RP 218. He was also asked if he would consider any

alternatives to insurance such as "bonding" that would demonstrate financial responsibility; Dr. Backlund testified he could think of no alternative that was acceptable. Anything that protected him from his patients' lawsuits, he said, would defeat his "witness to my patients." RP 224-25.

The evidence was that he communicated his beliefs regarding insurance to his patients by making available to them brochures explaining his decision. RP 40. He indicated that it was possible that not all of his patients knew about his position and also admitted that it would be possible for him, while on emergency call, to treat an unconscious patient who would be unable to appreciate his philosophy and accept the risk. RP 47.

Dr. Backlund produced at the hearing the brochure that he had available in his office. The brochure provided that

> I have elected not to be covered by malpractice insurance. Instead my insurance is in the Lord and in your trust in me. As a benefit to you, my fees will be lower accordingly.

The brochure did not mention, however, that there was a potential for patients to suffer damages in the millions of dollars as a result of his treatment as an orthopedic surgeon (RP 177), nor did it reveal the extent of Dr. Backlund's personal capacity to compensate them. The brochure did not explain that the hospital's insurance would not cover Dr. Backlund's patients for negligence when the hospital was not itself negligent (as Dr. Backlund mistakenly believed). RP 57-58.

There was no testimony that all or even a significant majority of his patients had read the brochure or were aware of his position. There was no evidence that those who did read his brochure understood that one of the

consequences of his beliefs was the possibility of catastrophic injury without remedy. See Exhibits F and G. There was no evidence of how minors or those patients who are in pain or who are in the state of an emergency are able to make an informed "choice" over Dr. Backlund's position on insurance. Moreover, Dr. Backlund indicated that he did not consider it "that important" whether his patients knew or did not know he carried insurance. RP 47.

After hearing testimony, the Board on December 12, 1983 determined that enforcing the Bylaw in Dr. Backlund's case was supported by strong reasons of public policy. The Board was willing to give a temporary exemption from the requirement to physicians who, for whatever reason, had difficulty purchasing insurance, but found those circumstances not to be present in Dr. Backlund's case. RP 266.

First, the District determined that the requirement protected its constituents and patients by assuring that an an adequate fund was provided for payment of any claims arising out of errors committed at Evergreen General Hospital, regardless of the District's fault. Commissioner Russ McClintick expressed this concern:

> I feel as representing a public body and the community that we have an obligation to the patients coming into the Hospital and I think that we have a responsibility to the patients if anything accidental were to happen that the Hospital is responsible. I think the only way the Hospital can be responsible is that the people working within the Hospital also have the same responsibility.

RP 265-66. See also RP 252.

Second, the Commissioners determined that rejecting Dr. Backlund's claim of exemption was required in order to fulfill their fiduciary duty to protect the assets of the Hospital. RP 267. They found that were was a significant potential for increased premiums and legal expenses that

would result from Dr. Backlund's lack of insurance. RP 272-74.

The evidence at the hearing had demonstrated that there was a causal relationship between the amount of claims made against Evergreen and its insurance premiums. The more claims, the greater the costs of defense, settlement, and judgments its carrier would have to pay and the larger the subsequent premiums would be (although the costs would be shared by all the member hospitals insured by the Fund). RP 140-47.

Finally, the Board found that it was providing de facto insurance coverage for Dr. Backlund, which was paid for by the taxpayers. RP 268.

The Board unanimously voted to suspend Dr. Backlund's staff privileges at Evergreen General Hospital. The Board entered findings of fact reflecting its position that Dr. Backlund's failure to

purchase insurance would adversely affect the patients of the District's Hospital, and would pose a threat to the Hospital's assets. Findings ¶43.

On December 14, 1983, Dr. Backlund applied for a writ of certiorari from the King County Superior Court. On May 8, 1984, the Superior Court entered a judgment and an order reversing the decision of the Board of Commissioners, primarily on the ground that the finding of facts entered by the Board did not demonstrate a compelling interest to deny Dr. Backlund's assertion of his right to freely exercise his religion under the United States Constitution. The court limited its ruling by not requiring the hospital to reinstate Dr. Backlund to its referral lists.

On direct appeal, the Washington Supreme Court unanimously reversed. Backlund v. Board of Commissioners, 106

Wn.2d 632, 724 P.2d 981 (1986). First, it agreed with the trial court that Dr. Backlund's beliefs were sincere and accordingly warranted First Amendment protection. The court held that to justify infringement of a First Amendment right, the Board had the burden of proving "that (1) a compelling interest justifies the regulation in question and (2) the regulation is the least restrictive imposition on the practice of his beliefs to satisfy that interest." 106 Wn.2d at 641.

The court pointed out that "conduct motivated by religious beliefs may be subject to regulation if that conduct conflicts with the exercise of the interests of third parties." Id. In setting forth this principle, the court relied on United States v. Lee, 455 U.S. 252, 261 (1982), where it was stated:

> Congress and the courts have been sensitive to the needs flowing from

> the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. (Emphasis by the Washington Supreme Court.)

106 Wn.3d at 642.

The court noted that in the area of "health and safety," where third parties are impacted, governmental interests often override individual objections to uniform regulations. 106 Wn.2d at 642-4.

In finding the Bylaw supported by compelling governmental interests, the court noted that the testimony before the Board of Commissioners included:

> (1) that the bylaw assured, for the benefit of the Hospital's patients in the community, compensation for patients injured at Evergreen aside from any liability the Hospital might have;
>
> (2) that enforcement of the bylaw would have a positive impact on the

amount of liability expenses that Evergreen would have in malpractice claims;

(3) that if the Bylaw were not enforced, Evergreen would have potentially greater liability exposure because it is more difficult to settle claims prior to trial when an uninsured physician is involved;

(4) that when an uninsured physician is involved, other defendants having liability insurance become the targets of a medical malpractice suit because they have insurance coverage; and

(5) the insured defendants may pay amounts disproportionately greater than their degree of fault.

106 Wn.2d at 644-45.

Other findings indicated that requiring professional liability insurance served to decrease the practice of defensive medicine. 106 Wn.2d at 645. The court also took into account the Board's finding that the practical effect of a physician's decision not to purchase professional liability insurance is that the physician's hospital and others "more

or less subsidize the uninsured's practice." Id. at 645.

The court then expressly held that the Board owed non-delegable duties to its patients, which emcompassed "being able to adequately provide compensation to patients injured through the negligence of the hospital and the hospital staff, including those physicians to whom Evergreen has extended privileges." 106 Wn.2d at 645. (Emphasis supplied.)

The court also examined whether or not the regulation involved was the least restrictive means necessary to satisfy the compelling governmental interest. Here the court mentioned that despite the Hospital's attempt to negotiate a solution with Dr. Backlund, he "made it clear that he would only be satisfied with an exemption from the bylaw." Id. at 646.

Further, the court underscored that Dr. Backlund did not provide any assurance

he could respond in damages to an injured patient, but only that he would "do what he could" in that event. The court was understandably unpersuaded, "since good intentions do not satisfy judgments." Id. at 646. Dr. Backlund perfected his "appeal" to this Court on February 5, 1987.

Law and Argument

A. The Court should treat this case as a petition for writ of certiorari inasmuch as the appeal was improvidently taken.

This Court has under 28 U.S.C. §1257(2) appellate jurisdiction only when the "validity of a state statute is drawn into question" as being "repugnant to the constitution, treaties or law of the United States and the decision is in favor of its validity." In contrast, review of a state court decision shall be by certiorari by this Court "where any title,

right, privilege, or immunity is specially set up or claimed under the constitution" 28 U.S.C. §1257(3). At all times during this litigation, Dr. Backlund asserted that he was entitled to an exemption or waiver from the Bylaw on the ground that his free exercise rights prevented application of the Bylaw to him. See RP 55; Physician's Memorandum before the Joint Conference Committee at 8 (issue was whether Dr. Backlund's religious belief was overridden by public need). He has never challenged the validity of the law on First Amendment grounds. RP 10. At the hearing before the Board, Dr. Backlund's attorney claimed a "waiver" was "justified because [the bylaw] requires him to do something that is contrary to his [religious] conviction." RP 198; see also RP 87 and 94. Dr. Backlund summarized his position before the Washington Supreme Court as a request for

an "exemption from [the Bylaw]" because of his assertion of first amendment rights. Respondent's brief to the Washington Supreme Court at 5-6. The adverse decisions by the Board of Commissioners and the Washington State Supreme Court were expressly denials of his assertion of federal rights rather than a validation of a state statute. As the Washington Supreme Court stated:

> The Board's decision not to grant an exemption is supported by the findings and does not impinge upon Dr. Backlund's right to believe as he chooses, only upon his practice of those beliefs when such practice can be to the detriment of others.

106 Wn.2d at 648.

Where the "appellant" has only raised federally protected rights as a shield against enforcement of a legislative enactment, this Court has held that review in the Supreme Court must be by a petition for writ of certiorari. See Mergenthaler Linotype Company v. Davis, 251 U.S. 256

259 (1920). See also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 562-63 n. 4 (1979).

Moreover, Dr. Backlund's objections in both the King County Superior Court and the Washington State Supreme Court related primarily to the findings of fact made by the Commissioners rather than to the validity of the provisions of the State statute. Dr. Backlund argued in both courts that the findings demonstrated only "speculative" harm and, thus, did not support the decision of the Board. Physician's memorandum of authorities upon review to the King County Superior Court at 31-35. Respondent's brief to the Washington Supreme Court at 39-50. Constitutional objections relating primarily to the propriety of findings by a state agency rather than to the validity of the provisions of a state statute are reviewable only by certiorari and not by

appeal. See Lerner v. Casey, 357 U.S. 468, 473 (1958).

In any event, Rule 15.1(g) requires the appellant or petitioner to set forth in the statement of the case pertinent quotations of specific portions of the record where the questions sought to be reviewed were raised and the manner in which they were passed on. Dr. Backlund has failed to comply with this rule and this Court should summarily treat the case as an appeal improvidently taken. This is so since the appellee will have no opportunity to rebut any contention Dr. Backlund raises hereafter on this issue.

B. The questions presented by the appeal are not substantial.

1. The court below fully considered and correctly decided the issues raised.

The decision by the Washington State Supreme Court was arrived at by careful

application of the law established by this Court. The decision was a sound one that recognized that the District is in the unique position of being the only entity that can protect its patients that suffer damages as a result of Dr. Backlund's treatment, where he alone is adjudged to be negligent.

The court's decision therefore was a holding that Dr. Backlund's belief must defer to that possibility. Moreover, the additional concerns the Hospital had with regard to jeopardizing the assets of the Hospital, reducing its premiums for insurance coverage, the practicing of defensive medicine and reducing the anxiety of those staff members compelled to work with Dr. Backlund, added to the weight of the interests of the District had in refusing to grant Dr. Backlund an exemption.

The Court recognized that those who enter into a commercial activity as a matter of choice, may not impose their religious beliefs on a regulatory scheme that is binding on all others. In so holding the court faithfully applied the doctrine in United States v. Lee, 455 U.S. 252 (1982); see also Bob Jones University v. United States, 461 U.S. 574, 602-604 (1983).

2. The decision is consistent with the jurisdictions of other state and federal courts and the decisions of this Court.

Dr. Backlund has failed to identify the decision of any other state or federal court that is in conflict with the decision of the Washington State Supreme Court. The appellee's review of the law reveals that the Washington State Supreme Court's decision is consistent with all other state jurisdictions and the decisions of this Court.

While there is no case appellee is familiar with in which a mandatory insurance requirement has been challenged on religious grounds, all jurisdictions faced with challenges to mandatory medical malpractice insurance as a condition of hospital staff privileges have denied the challenges. See, e.g., Holmes v. Hoemako Hospital, 117 Ariz. 403, 573 P.2d 477 (1977); State ex rel. Schneider v. Liggett, 223 Kan. 610, 576 P.2d 221, 227, appeal dismissed, 439 U.S. 808 (1978). Cf. Cal. Health and Safety Code, §1319 (West 1979) (reversing by statute a decision in favor of a physician in Rosner v. Pennisula Hospital District, 224 Cal.App. 2d 115, 36 Cal.Rptr. 332 (1964).

Moreover, the Washington Supreme Court's decision is consistent with the decisions in other state courts denying challenges on religious grounds to commercial regulations binding on all

others in the field. See, e.g., Cooper v. Eugene School District, 301 Or. 358, 723 P.2d 298 (1986), appeal dismissed ___ U.S. ___ 1987) (school law barring teachers from wearing religious dress); Minnesota v. The Sports and Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), appeal dismissed, ___ U.S. ___, 106 S.Ct. 3315 (1986) (anti-discrimination laws); State ex rel. Douglas v. Faith Baptist Church, 207 Neb. 802, 301 N.W. 2d 571, appeal dismissed, 454 U.S. 803 (1981) (defendants claimed that their religious convictions prevented them from complying with state school laws).

3. Because the issue presented to this Court is primarily factual and the facts are unique to this case, this Court's resolution of the case will not provide guidance to other courts.

The argument presented to this Court by the appellant is that the Washington

Supreme Court incorrectly determined that the facts as established by the Board of Commissioners represented a compelling interest. There is no serious question that the Washington State Supreme Court in resolving this dispute applied the proper rules of law to the facts. In reviewing this decision, this Court would be merely rehearing the factual record, and not establishing law that will more clearly guide lower state courts in resolving disputes over the free exercise of religion.

As discussed above, there is no case that appellee's counsel has been able to find where a person has challenged a mandatory insurance requirement on the basis of religious beliefs or on the basis of any other "fundamental right." However, because all states have mandatory insurance requirements in a variety of areas, plenary review would have

wide-ranging implications. To the extent the issue is significant, it makes more sense to allow the general question to be decided by lower courts first so that the complexity of the issue and its consequences can be fully appreciated.

Further, the Court's decision, if it accepted review, would not resolve this case. Dr. Backlund's primary argument is that because Evergreen's insurance is community rated rather than experience rated, its premiums would not be significantly affected if it were drawn into a lawsuit as a result of Dr. Backlund's negligence. Dr. Backlund argues from this that the Hospital's interests are not compelling. After the record closed, however, the Hospital's insurance coverage was placed with another carrier, Lloyd's of London, with premiums based on an experience rating.[2]

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[2]The Washington Rules of Appellate Procedure only permit supplementation of

4. Dr. Backlund's arguments in favor of this Court noting probable jurisdiction are not persuasive.

Dr. Backlund's principal argument is that the Board's interest in providing a fund to compensate patients for negligence of Dr. Backlund regardless of anyone else's liability is "paternalistic."[3]

2(continued) the record with additional evidence when that "additional evidence would probably change the decision being reviewed." RAP 9.11. Obviously, the Washington Supreme Court would not be able to make such a finding in this case.

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[3]Dr. Backlund has also asserted that the Hospital District's claim that one of its interests in enacting the Bylaw was to provide a fund to compensate injured patients was not "raised" as a defense of the bylaw in its hearing. In fact, it was raised by the commissioners. Dr. Backlund himself, before the Joint Conference Committee, objected to the Hospital's public announcement that the decision to impose the requirement was made to "be sure the patients will be compensated if they are injured." RP 31. See also RP 265-66.

This is closely related to his contention that the case implicates the privacy and associational rights of Dr. Backlund's patients. His argument presumes that his patients have freely chosen to be treated by him and that this decision should not be interfered with by the Hospital District.

First, there is no evidence in the court below that there was anything approaching informed consent on the part of the patients. The evidence in the record is that the way in which Dr. Backlund communicated his beliefs with regard to insurance was through his brochure. Other evidence was that two of his patients claimed by affidavit that they had read the brochure.

Regardless of whether patients actually read the brochure, it failed to disclose the catastrophic risk that the patients were assuming by being treated by

Dr. Backlund. The brochure did not tell the patients that they would not be covered by the insurance of others if Dr. Backlund was alone adjudged to be liable, nor did it disclose the extent of Dr. Backlund's ability personally to satisfy judgments against him. Furthermore, there are serious doubts as to whether patients in emergency situations (or simply cases where considerable pain is involved) or minor patients can meaningfully "consent" to the terms of the brochure.

Even assuming there was informed consent, however, legal "paternalism" is a well recognized function of the state. See Walters v. National Association of Radiation Survivors, ___ U.S. ___, 105 S.Ct. 3180, 3190 (1985) ("paternalism . . . a legitimate legisative goal."); Jacobson v. Massachussets, 197 U.S. 11 (1905) (mandatory vaccinations upheld despite violation of the individual's

religious beliefs). Such "paternalism" protects the public from unrecognized dangers, often when one party is particularly vulnerable to another party's influence or bargaining power. An illustration is the principle of law that prevents a health care provider from attempting to contractually limit liability for negligence. See Meiman v. Rehabilitation Center, Inc., 444 S.W.2d 78 (Ky. 1969). Cf. Shorter v. Drury, 103 Wn.2d 645, 695 P.2d 116 (1985). Dr. Backlund's argument would logically allow him to require patients to agree in advance not to sue him--he could claim that such suits hindered the trusting relationships necessary to his religiously inspired views of proper medical care. RP 29-34.

This is not a case where an entire sect has a tradition of accepting the risks of particular conduct, and providing

a remedy for the harm that results from that conduct. Compare Wisconsin v. Yoder, 406 U.S. 205 (1972).

As to the claim of injury to privacy and associational rights, there is no evidence in the record that Dr. Backlund's patients shared his beliefs or would refuse to be treated by him if he obtained insurance; rather, the evidence is that two of his patients (who, because they testified by affidavit, could not be cross-examined) were willing to accept his beliefs.[4]

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[4]There is no evidence in the record (nor does appellant cite to such evidence) that any patient has claimed that his right of privacy or association was violated by the Board's action. No patient has brought a lawsuit with regard to such claim. Dr. Backlund never alleged standing to assert those rights for the patients either before the Board or in his petition for writ of certiorari before the King County Superior Court. Accordingly, since this "issue" was never argued or supported by any evidence in the courts and the administrative board below, this court should strike the issue from the

The concerns of the District, further, are not satisfied by Dr. Backlund's newly discovered "less restrictive alternatives." Initially, it is submitted that Dr. Backlund's claim of less restrictive alternatives should not be considered by this Court. The record does not reveal the nature of the confidential settlement discussions that explored alternatives to Dr. Backlund's suspension. Dr. Backlund's recital of alternatives, moreover, is at opposition with his statements on the record that he sought only an exemption or waiver and could conceive of no alternatives that would be acceptable to him.

In any case, the alternatives suggested do not address the real concerns of the District. For example, Dr. Backlund proposes to provide an extra million

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4 (continued) jurisdictional statement. Alternatively, the claim should be dismissed summarily.

dollars worth of insurance coverage for the Hospital. This alternative does not provide a remedy for his injured patients if he is adjudged solely liable or address the other concerns of the District concerning deep-pocket liability, defensive medicine, difficulties in settling cases with bare co-defendants, staff anxiety and other matters.

Dr. Backlund also proposes (for the first time in this case) to pay any premium increases for the Hospital caused by his negligence. This alternative assumes that the amount of the increase attributable to his negligence could be segregated (an unlikely possibility that is not demonstrated on this record). More important, there is no indication how Dr. Backlund could insure that a fund would be available to pay for the increases which are indefinite as to amount and length of time.

Dr. Backlund also argues that the Hospital's duty to provide for a fund to compensate injured patients is somehow suspect and does not rise to the level of being compelling because it was created by the Washington Supreme Court and not by the State Legislature. Dr. Backlund argues "[t]o be sure, if the state legislature had imposed the requirement, as an expression of its general power to further the welfare of its citizens, the [Washington] Supreme Court would be on more solid ground." Jurisdictional Statement at 27.

There is no authority with which appellee is familiar that creates a hierarchy of duties based on whether a duty is created by a court or a legislature, as suggested by the appellant. The type of duty imposed by the Washington court here is hardly different in kind from the range of

responsibilities placed on public and private parties by common law courts. Regardless, the appellant fails to address the fact that the Washington state legislature delegated its authority to create such a duty, by enacting enabling legislation for a public hospital districts, to the Board of Commissioners in this case.

Dr. Backlund further argues that this case presents substantial new doctrinal questions to this Court. For example, he contends that it implicates whether the doctrine of Sherbert v. Verner, 374 U.S. 398 (1963), should apply to the denial of public facilities. However, the Washington Supreme Court decided that the Sherbert doctrine did apply, but that the interests of the District overrode Dr. Backlund's free exercise rights--a factual determination. See 106 Wn.2d at 641.

Dr. Backlund suggests that the issue of whether the fact that "third parties are affected necessarily establishes that a compelling state interest exists" would be a doctrinally substantial question. But it is well established that a compelling interest may be established because of an adverse effect on third parties. See e.g., United States v. Lee, 455 U.S. 252 (1982). Whether the adverse effect will in a particular case justify the government in restricting the exercise of a religious belief depends upon the degree of danger to the third party, which, again, is a factual issue.

Finally, Dr. Backlund maintains that the law of joint and several liability has changed in Washington since the record closed and that the state now follows a rule of comparative liability for joint tortfeasors. Jurisdictional statement at 24. Dr. Backlund's characterization of

state law on this point requires clarification. In 1986, the Washington statute providing for joint and several liability was amended so that it would not apply in those circumstances where comparative fault on the part of the plaintiff was established. See RCW 4.22.030; 4.22.070. It is the rare case, of course, where a medical malpractice plaintiff is adjudged to be comparatively at fault.

Dr. Backlund also argues that the Commissioners relied on "speculative" evidence in reaching their decision. He incorrectly assumes that positions based on nonquantifiable evidence are supported only by speculation. As United States v. Lee, 455 U.S. 252 (1982) demonstrates, a compelling state interest may be supported by factual although nonquantifiable evidence. In Lee, an Amish employer objected to the withholding of social

security tax for his employees, asserting that such tax conflicted with his right to freely exercise his religion. Rejecting the employer's argument, this court stressed that "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." There was no quantification of the probability of the harm to the tax system. Instead, the conclusion was based on reasonable assumptions about the likely consequences of accepting the claim for exemption.

In the present case the Board of Commissioners relied on factual evidence in reaching its decision. Despite questioning from the Board, Dr. Backlund would provide no evidence of how he could compensate patients for injuries suffered, for which he alone was liable. Perhaps the Board did not--or could not--assign a

precise probability to this consequence but this does not mean the danger is conjectural. The other harms--such as the causing of staff anxiety, defensive medicine, and the likelihood of the hospital's assets being adversely affected--may also be difficult or impossible to quantify, but concern over these damages was based on the direct experiences of qualified observers.

Conclusion

This case was correctly decided by the Washington Supreme Court. The Board's interests are indeed compelling. Moreover, reversal of the Board of Commissioners would not permit Dr. Backlund to practice without insurance. It could only permit him to practice with the insurance purchased by others, except in those circumstances where he is adjudged solely liable for injury to one of his patients. And, even then, the

reality is that the hospital and other physicians would, as a practical matter, be insuring Dr. Backlund's defense.

Regardless of whether the Washington Supreme Court's unanimous decision was incorrect, the case itself presents no novel issues of general applicability. Accordingly, this court should decline plenary review.

Respectfully submitted,

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